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IN THE

Supreme Court of the United States

October Term, 1954.

No. 691

DR. ROSS H. ELLIOTT,

Petitioner,

vs.

THE STATE OF OREGON,

Petition for Writ of Certiorari to the Supreme Court of the State of Oregon.

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IN THE

Supreme Court of the United States

October Term, 1954.

No. .....

DR. ROSS H. ELLIOTT,

Petitioner,

vs.

THE STATE OF OREGON,

Petition for Writ of Certiorari to the Supreme Court of the State of Oregon.

Petitioner, Dr. Ross H. Elliott, respectfully prays for a Writ of Certiorari to the Supreme Court of the State of Oregon, the highest court in that State (Ore. Const., Art. VII, Secs. 1, 6), in order to review its judgment affirming a conviction and sentence of petitioner for violation of Section 23-927, Oregon Compiled Laws Annotated (O. C. L. A.) [Oregon Revised Statutes (O. R. S.), Section 161.310] and sustaining the constitutionality of that section.

Pursuant to Rule 23 of this Court, your petitioner respectfully shows:

Opinion Below.

The trial court wrote no opinion. It rendered an order [R. 7] overruling petitioner's demurrer to the indictment [R. 4-5].

The opinion of the court below [R. 11-18] is reported at 59 Ore. Adv. Sheets 507, 277 P. 2d 754. Said opinion is appended hereto as Appendix "A."

Statement of Grounds Upon Which the Jurisdiction of This Court Is Invoked.

1. The judgment sought to be reviewed is dated December 8, 1954, and the time of its entry is the same [R. 19]. A copy thereof is appended hereto as Appendix "B".

2. Timely petition for rehearing was filed [R. 20; Rule 20, Ore. S. Ct. Rules; 190 Ore. 706]. Rehearing was denied on January 5, 1955 [R. 22]. No extension of time was requested within which to petition for certiorari nor any order made with respect thereto.

3. This court has jurisdiction to review the judgment in question by writ of certiorari under the provisions of 28 U. S. C. 1257(3) because the validity of an Oregon statute, Section 23-927, O. C. L. A. (O. R. S. 161.310), is drawn in question on the ground of its being repugnant to the Due Process clause of the Fourteenth Amendment to the United States Constitution.

Questions Presented for Review.

Challenge was made in the courts below to the sufficiency of the indictment and to the validity of the statute and the question presented here is:

> Whether Section 23-927, O. C. L. A. (O. R. S. 161.310) on its face and as applied in this case violates the Due Process clause of the Fourteenth Amendment on the ground of being vague, indefinite and uncertain.

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Statute Involved.

Section 23-927, Vol. 3, O. C. L. A., p. 131 (Vol. 1, O. R. S. p. 1006, Sec. 161.310) provides as follows:

> "If no punishment is expressly prescribed for the act by the criminal statutes, any person who wilfully and wrongfully commits any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to public morals, upon conviction, shall be punished by imprisonment in the county jail for not less than one month nor more than six months, or by fine not less than $50 nor more than $200."

Statement of the Case.

This case is before this court on the statute, the indictment and the demurrer thereto [R. 12]. Petitioner was indicted in the Circuit Court of Oregon for violation of the above quoted section [R. 2]. The accusation was [R. 2]:

> "committing an act grossly disturbing the public peace and health, openly outraging public decency and injurious to public morals."

by maintaining

> "a certain public place, known as the office of Dr. Ross H. Elliott . . . in the City of Portland . . . with the intent and purpose . . . of wilfully and unlawfully committing, producing and procuring abortions in said public place, upon women pregnant with child . . ." [R. 2].

There are further allegations in the indictment [R. 2] charging the wilful and wrongful commission of an abortion on one married woman and upon other women unmarried [R. 2]. The court below ruled these latter allegations to be, in effect, immaterial to the substantive crime charged [R. 16].

A demurrer to the indictment was interposed in the trial court [R. 4-5], and overruled [R. 7].

The federal question sought to be reviewed was raised by petitioner by assignment of error in his opening brief before the court below. The question was considered by the court and passed upon adversely. Pertinent portions of the court's opinion showing that the federal question was timely and properly raised are these:

> [R. 13]: ". . . (T)he constitutional question is raised that the Nuisance Act is vague and uncertain and therefore void by virtue of the Fourteenth Amendment to the United States Constitution."
>
> [R. 15]: "We hold that the act challenged is constitutional and not violative of the Fourteenth Amendment to the United States Constitution."

Reasons Relied on For the Allowance of the Writ.

The court below has decided a federal question of substance (the constitutionality under the Fourteenth Amendment of such a statute as that in question) not heretofore determined by this court[1] and in a way probably not in accord with the applicable decisions of this court.

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[1]The court below noted [R. 14] that the "Act has been on the statute books of this state for nearly a century and its constitutionality, until now, has never been challenged."

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Argument Amplifying the Reasons Relied on for the Allowance of the Writ.

The principle that a statute which is vague, indefinite, uncertain or which furnishes no reasonably ascertainable standard of guilt is violative, in the case of a state statute, of the due process clause of the Fourteenth Amendment, is well known. This court has spoken on that score many times. The crucial question in every case is, of course, whether the particular statute in question falls within or without the ban. It is petitioner's contention that the statute here being considered falls within the ban and that the court below, in failing to so hold, acted contrary to many decisions of this court which have spelled out the rules that: the crime must be defined with appropriate definiteness; there must be ascertainable standards of guilt; no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes; all are entitled to be informed as to what the state commands or forbids; a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law; the statute must be certain both with regard to the person included within its scope and in regard to the applicable tests to ascertain guilt.[2]

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[2]*Connally v. General Construction Co.*, 269 U. S. 385, 391-393; *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 89; *Champlin Ref. Co. v. Corporation Commission*, 286 U. S. 210, 242; *Smith v. Cahoon*, 283 U. S. 553, 564; *United States v. Brewer*, 139 U. S. 278, 288; *Musser v. Utah*, 333 U. S. 95, 96, 97; *Winters v. New York*, 333 U. S. 507, 515; *Lanzetta v. New Jersey*, 306 U. S. 451,

And the enactment is to be tested on its face.

> "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression."[3]

Tested against these rules, petitioner submits that the enactment here falls afoul of the due process guarantee.

Thus the statute makes criminal

> "any act which grossly injures the person or property of another, *or* which grossly disturbs the public peace or health, *or* which openly outrages the public decency and is injurious to public morals."[4] (Italics ours.)

Such words at once make inevitable speculation as to what is meant. We do not believe we are overstating the case when we contend that reasonable men do differ as to what acts may be outrageous of public decency or health and as to what acts may be injurious to public morals, to say nothing of there being anything but certainty as to what acts may be "grossly" disturbing of the public peace or health as distinguished from what may be "mildly" disturbing or a little bit so.

453; *Cline v. Frink Dairy Co.*, 274 U. S. 445, 458; *A. B. Small Co. v. American Sugar Refining Co.*, 267 U. S. 233, 239; *Collins v. Kentucky*, 234 U. S. 634, 638; *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221-223; *Cantwell v. Connecticut*, 310 U. S. 296, 307, 308, 311; *Pierce v. United States*, 314 U. S. 306, 311.

[3]*Lanzetta v. New Jersey*, 306 U. S. 451, 453. See also *United States v. Reese*, 92 U. S. 214, 221; *Stromberg v. California*, 283 U. S. 359, 368; *Lovell v. Griffin*, 303 U. S. 444, 451, 452.

[4]No effort was made by the state to charge a violation of that part of the statute which refers to grossly injuring the person or property of another. [R. 2, 15, 16.]

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In *Musser v. Utah,* 333 U. S. 95, the charge was under a Utah statute which made it a crime to conspire

> "to commit any act injurious to the public health, the public morals or to trade or commerce or for the perversion or obstruction of justice of the due administration of the laws."

This court *sua sponte* raised the question as to whether the statute was too vague to stand. This court said (333 U. S. at 96, 97):

> ". . . It is obvious that this is no narrowly drawn statute. We do not presume to give an interpretation as to what it may include. Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order. In some States the phrase 'injurious to public morals' would be likely to punish others because of the varying policies on such matters as use of cigarettes or liquor and the permissibility of gambling. This led to the inquiry as to whether the statute attempts to cover so much that it effectively covers nothing . . ."

Accordingly, the case was sent back to the state court for the state court's consideration of the point. On the remand, the Supreme Court of Utah held the statute void for vagueness under the Fourteenth Amendment. The court said (*State v. Musser,* 118 Utah 537, 538, 539, 223 P. 2d 193, 194):

> ". . . The argument before this court has developed no reason why we should believe that the legislature intended, in using this language, that it

should be limited to a meaning less broad than the words therein used would indicate in their ordinary sense. No language in this or any other statute of this state or other law thereof or any historical fact or surrounding circumstance connected with the enactment of this statute has been pointed to as indicating that the legislature intended any limitation thereof other than that expressed on the face of the words used. We are therefore unable to place a construction on these words which limits their meaning beyond their general meaning. The conviction of the defendants thereunder cannot be upheld. This part of *the statute is therefore void for vagueness and uncertainty under the Fourteenth Amendment to the Federal Constitution.*" (Italics added.)

The similarity of the language in the statute in the *Musser* case to that in the statute at bar is clear.

Statutes embodying like language in other states have also been held invalid on the same ground. An Arkansas statute embodied substantially the same language as did the Utah statute considered in the *Musesr* case. Striking down the statute as too vague, the Arkansas Supreme Court in *Ex parte Andrew Jackson,* 45 Ark. 158, 164, said:

> "We cannot conceive how a crime can, on any sound principle, be defined in so vague a fashion. Criminality depends, under it, upon the moral idiosyncracies of the individuals who compose the court and jury. The standard of crime would be ever varying, and the courts would constantly be appealed to as the instruments of moral reform, changing with all fluctuations of moral sentiment. The statute is simply null. The constitution, which forbids *ex post facto* laws, could not tolerate a law which would make

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> an act a crime, or not, according to the moral sentiment which might happen to prevail with the judge and jury after the act had been committed."[5]

In *State of Truby,* 211 La. 178, 29 So. 2d 758, the court had before it the question of the validity of a statute defining the crime of keeping a disorderly place as the

> "maintaining of a place to be used habitually for any . . . *immoral* purpose." (Italics added.)

The court held the statute unconstitutional, saying (211 La. at 200-201):

> "The word 'immoral,' as used in Article 104 of the Criminal Code, is, in our opinion, vague, indefinite, and uncertain, and thus it is left to the court to determine in any given case what constitutes an 'immoral purpose' within the meaning of the article. For, as pointed out in Black's Law Dictionary, the word 'immoral' means 'inimical to the public welfare according to the standards of a given community, as expressed in law or otherwise.' Since that which might be considered 'immoral' in one locality or section of this state might not be deemed 'immoral' in another locality or section, in any given case it is left to the court of the particular locality to determine and decide what constitutes and is an 'immoral purpose.' "

The opinion is an exhaustive one, and in it, the court called attention to *United States v. Lewis,* 110 F. 2d 460

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[5]This case has been referred to as a "leading case," (*State v. Bryant,* 219 Ark. 313, 316, 241 S. W. 2d 473, 474 and has been followed by many courts. See, for example, *Chicago & N. W. Ry. Co. v. Dey,* 35 Fed. 866, 876 (C. C. D., Iowa 1888); *Tozer v. United States,* 52 Fed. 917, 920 (C. C. E. D., Mo. 1892).

(C. C. A. 7, 1940), cert. den. 310 U. S. 634, 60 S. Ct. 1077, 84 L. Ed. 1404, which considered the validity of the so-called White-Slave Traffic Act, 18 U. S. C. 397 *et seq.*, which makes criminal the knowing transportation of any girl interstate "for the purpose of debauchery or *for any other immoral purpose.*" (Italics added.) Carefully analyzing the reasoning of the Court of Appeals for the Seventh Circuit, the Louisiana court said (211 La. at 194-195):

> "That decision is full authority for the proposition that the Federal courts, in construing the White-Slave Traffic Act, have treated the words 'other immoral purpose' when used alone as not being susceptible of a definite and fixed meaning . . ."

In *People v. Saad,* 105 Cal. App. 2d Supp. 234 P. 2d 785, the statute under consideration made it a crime for a person not to leave a race track when ordered so to do by the inspectors of the California Horse Racing Board for "practices inimical to the public interest". Citing this court's decisions in *Lanzetta v. New Jersey,* 306 U. S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888, 891, and *Connally v. General Construction Co.,* 269 U. S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322, 328, the court held (105 Cal. App. 2d (Supp.) at 854) that:

> "those words are too indefinite in their import to serve in a definition of criminal conduct."

The court called attention (*ibid.*) to the decision of the California Supreme Court in *Orloff v. Los Angeles Turf Club,* 36 Cal. 2d 734, 739, 227 P. 2d 449, 453, which had held the word "immoral" to be too indefinite a standard.

That the vague term "inimical to the public interest" is of the same constitutional infirmity as the vague terms

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used in the Oregon statute here being considered, especially that portion which reads "injurious to public morals," is pointed up in *State v. Truby, supra,* where the Louisiana Supreme Court called attention (211 La. at 200) to the definition in Black's Law Dictionary of the word "immorality" as meaning "inimical to the public welfare."

In *Locklin v. Pridgeon,* 158 Fla. 737, 30 So. 2d 102, the statute under attack provided that

> ". . . it shall be unlawful for any person to commit any act under color of authority as an officer, agent or employee of the United States government, State of Florida, or any political subdivision thereof when such act is not authorized by law, . . ."

The court held the statute void for vagueness, saying (158 Fla. at 742):

> "By the terms of this act every officer, agent or employee of the Federal Government, of the State and the political subdivisions of the State, is required to determine at his peril what specific acts are authorized by law and what are not authorized by law. Honest and intelligent men may reasonably have contrary views as to whether or not a specific act of an officer is or is not authorized by law and, therefore, the violation or non-violation of this statute may reasonably depend upon which view the court or a jury may agree with.
>
> "It seems to us that nothing could be more indefinite and uncertain than what is attempted as a penal statute in the instant case."

Assuredly the statute at bar furnishes no greater standard. Indeed, the words "act not authorized by law" furnish a more certain standard and are easier of ascer-

tainment then the vague words "public peace or health," "public decency," "public morals," "grossly," "openly."

The court below met the challenge to the statute on the ground of vagueness, not by pointing to any definition of what the words meant nor by suggesting that there was any certainty.[6] Rather it disposed of the constitutional argument by saying that in a previous case (*State v. Atwood*, 54 Ore. 526, 102 Pac. 205, 104 Pac. 195), the same acts were charged against the defendant there and his conviction was upheld. But this line of reasoning begs the question. Concededly there had been no previous test of the statute on constitutional grounds [R. 14]. The reasoning of the court below ignores the rule that the statute is to be tested on its face and not by the accusation under it, nor by the proof under the charge.

> "If on its face the challenged provision is repugnant to the due process clause, specifications of details of the offense intended to be charged would not serve to validate it." (*Lanzetta v. New Jersey*, 306 U. S. 451, 453.)[7]

Moreover, the vice of the reasoning of the court below is precisely that which was warned against by this court in *United States v. Reese*, 92 U. S. 214, 221, 23 L. Ed. 563:

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large . . ."

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[6]A task which, it is submitted, the court could not meet.

[7]See also: *Stromberg v. California*, 283 U. S. 359, 369; *Herndon v. Lowry*, 301 U. S. 242, 261; *Thornhill, v. Alabama*, 310 U. S. 88, 96; *Carlson v. California*, 310 U. S. 106.

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In *State v. Vallery*, 212 La. 1095, 34 So. 2d 329, the Louisiana Court, following *State v. Truby, supra,* held invalid for uncertainty a statute which defined contributing to the delinquency of a juvenile as

> ". . . the intentional enticing, aiding, or permitting, by anyone over the age of seventeen, of any child under the age of seventeen to: . . . perform *any immoral act.*" (Italics added.)

During its discussion the court pointed out the error of doing that which the lower court did here. Thus, the court said (212 La. at 1090-1100):

> "Courts can do no more than interpret and construe statutes. They cannot, under the guise of interpretation, assume legislative functions. For us to hold as suggested in this article[8] would, in effect, be for us to clothe the several courts of the state with the power to not only decide what constitutes an immoral act within the concept of the community's accepted standard of 'immoral' but also to determine just what are the well established and well accepted standards of morality in the various communities of which these respective districts are composed, thus delegating to the judiciary a function that is exclusively within the province of the legislature, with the result that there would be no certain or understandable rule and no uniform standard of conduct to guide the individual in ascertaining what acts it is his duty to avoid, doing violence not only to the constitutional requirement that the ascertainable standard of guilt

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[8]In 21 Tulane L. Rev. 545, the holding in the *Truby* case was criticized and it was suggested that the Court define "immoral" as being "identical with what violated the well established and well accepted standards of the community." (Footnote ours; not in quotation.)

> by which all citizens are to be guided be fixed by the legislative branch of the government but also to the equal protection and due process clauses safeguarding against discrimination."

The cases just reviewed make it clear that the statute at bar violates due process.

It cannot be said that the statute here is like those in *Omaechevarria v. Idaho,* 246 U. S. 343, and *Waters-Pierce Oil Co. v. Texas,* 212 U. S. 86, as to which this court said in *Winters v. New York,* 333 U. S. 507, 517:

> "this Court goes far to uphold state statutes that deal with offenses, difficult to define, when they are not intertwined with limitations on free expression."

If, as did the court below, one looks to the indictment, it is at once seen that the offense against which the catch-all statute is being used is not difficult to define. A statute making it illegal to commit abortions is surely not one difficult to define. Indeed, the State of Oregon has such a statute on its books. (O. R. S. 163.060.) Moreover, if it had been the intention of the legislature to make criminal the equipping and maintaining of an office for the purpose of committing abortions, it showed that it had the capacity to make its intentions known.[9]

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[9]Thus in O. R. S. 465.110 the Oregon Legislature provided that "whoever erects, establishes, continues, maintains owns or leases any building, erection or place . . . where any person administers to any woman, whether pregnant with child or not, any medicine, drug or substance whatever, or uses or employs any instrument or other means, with intent thereby to destroy a child of

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Ironically, the definition by the legislature is on the civil side. To supply this deficiency, the District Attorney and the lower courts here seized on the statute in question to make criminal that which the legislature knew how to define and prevent, but chose not to make criminal.

The statute at bar leaves open

> "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." (*United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 89.)

It therefore can be used not only to punish the type of conduct charged against petitioner here, but it can be used, depending upon the personal views of the prosecutor or the judge or the jury, to punish the publication of material, political, religious or otherwise felt to be objectionable at the particular moment, but which indeed, is protected by the First Amendment guarantees.

> "Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained." (*Winters v. New York*, 333 U. S. 507, 520.)

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such woman, unless the same is necessary to preserve the life of such woman or unless such is done for the relief of a woman whose health appears in peril because of her pregnant condition after consultation with another duly licensed medical or osteopathic physician and surgeon under the conditions and restrictions prescribed in O. R. S. 681.140 or subsection (2) of O. R. S. 677.190, is guilty of maintaining a nuisance." And provision is made (O. R. S. 465.110 and 465.120) for injunction and abatement of same.

Conclusion.

The Petition for Writ of Certiorari to the Supreme Court of Oregon should be granted.

Respectfully submitted,

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APPENDIX "A".

Copy of Opinion of Court Below [R. 12-18], 59 Ore. Adv. Sheets 507, 277 P. 2d 754.

No. 5395—December 8, 1954.

In the Supreme Court of the State of Oregon

In Banc.

State, Respondent v. Elliott, Appellant.

Appeal from Circuit Court, Multnomah County.

James R. Bain, Judge.

Argued and submitted November 17, 1954.

Leo Levenson, Portland, argued the cause and filed briefs for appellant.

James J. Kennedy, Deputy District Attorney, Portland, argued the cause for respondent. With him on the brief were John B. McCourt, District Attorney, and Charles E. Raymond, Deputy District Attorney, Portland.

Affirmed.

Latourette, C. J.

Dr. Ross H. Elliott, a chiropractor, was convicted and sentenced for the violation of §23-927, OCLA (ORS 161.310), previously referred to by this Court as the Oregon Nuisance Act, it being charged that he and another unlawfully kept and maintained an office for the purpose of producing abortions. The appeal comes to us on a demurrer to the indictment, which indictment follows:

"Dr. Ross H. Elliott, and Jane Doe, whose true name is unknown are accused by the Grand Jury of the county of Multnomah and State of Oregon, by this indictment of the crime of committing an act grossly disturbing the

public peace and health, openly outraging public decency and injurious to public morals, committed as follows:

"The said Dr. Ross H. Elliott and Jane Doe, whose true name is unknown, on the 24th day of April, A. D. 1951, in the County of Multnomah and State of Oregon, then and there being and then and there unlawfully conspiring, confederating and agreeing with each other thereto, did on said day in the said county and state, wilfully and wrongfully set up, equip, furnish with apparatus, and thence continuously until the 18th day of May, 1951, and ever since said time, keep and maintain a certain public place, known as the office of Dr. Ross H. Elliott, in the Times Building, in the City of Portland, said county and state, with the intent and purpose of them, the said Dr. Ross H. Elliott and Jane Doe, whose true name is unknown, of wilful, wrongfully and unlawfully committing, producing and procuring abortions in said public place, upon women pregnant with child, and so having set up, furnished, equipped, kept and maintained said public place with the intent and for the purpose aforesaid, the said Dr. Ross H. Elliott and Jane Doe, whose true name is unknown, on the 24th day of April, 1951, in the said public place known as Dr. Ross Elliott's office, in said county and state, did wilfully and wrongfully commit and produce an abortion upon one Hazel Doe, she, the said Hazel Doe then and there being a woman pregnant with child, and did then and there between the 24th day of April, 1951, and the 18th day of May, 1951, and ever since said time, wilfully and wrongfully commit and produce upon women then and there pregnant with child, the names and numbers of which women are to the Grand Jury unknown, abortions contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

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The Nuisance Act, upon which the indictment was based, is as follows:

"If any person shall wilfully and wrongfully commit any act which grossly injures the person or property of another, or which grossly disturbs the public peace or health, or which openly outrages the public decency and is injurious to public morals, such person, if no punishment is expressly prescribed therefor by this Code, upon conviction thereof, shall be punished by imprisonment in the county jail not less than one month nor more than six months, or by fine not less than $50 nor more than $200." §23-927, OCLA.

For the first time, on appeal, the constitutional question is raised that the Nuisance Act is vague and uncertain and therefore void by virtue of the 14th Amendment to the United States Constitution. This act has been construed and upheld by this court in numerous cases. In State v. Atwood, 54 Or. 526, 102 P. 295, 104 P. 195, we had before us an indictment which parallels in all material respects the present indictment and we there held that the indictment was sufficient under the Nuisance Act. We quote from that opinion as follows:

"* * * And clearly the acts complained of in this indictment are injurious to public morals, and we conclude that such acts constitute a nuisance, although not performed in a public place, or may not disturb the peace or quiet of the community or the public. They do openly outrage public decency, and are injurious to public morals, and such is the effect of the acts charged, even though not done in a public place, or in view of the public. * * *"

It is a universal rule that a penal statute must be definite and certain and if not it is void by virtue of the 14th Amendment to the United States Constitution. The

fundamental purpose of this doctrine is to warn individuals of the criminal consequences of their conduct. Jordan v. DeGeorge, 341 U. S. 223, 95 L. ed. 886, 71 S. Ct. 703.

In State v. Anthony, 179 Or. 282, 169 P. 2d 587 (certiorari denied, 330 U. S. 826, 91 L. ed. 1276, 67 S. Ct. 865), the "void for vagueness" doctrine involving the precise constitutional question here raised was before us in a case where a party was convicted upon an indictment charging the commission of an act of sexual perversity. The statute upon which the indictment was drawn is §23-910, OCLA (ORS 167.040), which reads in part as follows:

"If any person shall commit * * * any act or practice of sexual perversity, whether with mankind or beast, * * * such person shall upon conviction thereof, be punished by imprisonment in the penitentiary not less than one year nor more than fifteen years."

In upholding the conviction in the Anthony case, *supra*, Mr. Justice Brand, in a well-reasoned and exhaustive opinion, traced the genesis and progress of the doctrine, treating the cases, both state and federal, bearing upon the subject. It would serve no useful purpose for us to restate the principles involved in this doctrine since a perusal of the opinion in that case will give a full understanding of the subject.

The Nuisance Act has been on the statute books of this state for nearly a century and its constitutionality, until now, has never been challenged. When we decided in the Atwood case, *supra*, that the maintaining of abortion clinics violated the Nuisance Act, such holding became a part of the statute as if written into it at the time of its enactment. State *ex inf.* Harvey v. Missouri Athletic

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Club, 261 Mo. 576, 170 S. W. 904. See 50 Am. Jur. 199, Statutes, §221.

Since the cardinal purpose of the "void for vagueness" doctrine is to warn individuals of the criminal consequences of their conduct, it ill-behooves defendant to claim at this late date that the statute is indefinite and that he was not forewarned that his nefarious practices were a violation of the same since State v. Atwood, *supra,* has been the law of this state for over 40 years.

Defendant argues that the Nuisance Act is indefinite and vague in that it is a catchall and leaves to the whim and caprice of a prosecutor the determination of what grossly disturbs the public peace or health, etc. How the act might affect the actions of others is of no concern to defendant for "It is an accepted rule that he who challenges an act under the 14th Amendment must be one against whom the act in fact operates without due process. This defendant is not such a person." State v. Anthony, *supra.*

We hold that the act challenged is constitutional and not violative of the 14th Amendment to the United States Constitution.

It is argued that since the Nuisance Act contains the provision: "If no punishment is expressly prescribed therefor by this code" the indictment in the present case must fail because it charges the crimes of conspiracy to commit a felony, manslaughter by abortion and an attempt to commit a crime and an assault, for all of which punishment is expressly prescribed by the code.

Defendant's contention is without merit since the gravamen of the charge in the indictment is unlawfully keeping and maintaining a public place for the purpose of pro-

ducing illegal abortions, which act grossly disturbed the public peace and health and openly outraged public decency, being injurious to public morals. The allegations in the indictment respecting conspiracy, abortions, etc., were merely elements, incidents, means or circumstances by which the substantive crime was committed and not the substantive crime itself.

In State v. Atwood, *supra,* we find the following language:

"The allegations of abortion upon Mahala Roberts and other women do not state facts that constitute a crime under Section 1748, B. & C. Comp., and are not intended to, but are only allegations of acts done in the performance of the purpose and intent charged, which are necessary elements of the nuisances, and do not charge separate offenses: State v. Waymire, 52 Or. 281, 97 Pac. 46."

The claim of duplicity likewise fails in that the indictment charges only one crime.

It is next claimed that the "facts alleged in the indictment do not fall within the purview of section 23-927, OCLA, for the acts are not openly done. The answer to this proposition will be found in the Atwood case where we said:

"* * * They do openly outrage public decency, and are injurious to public morals, and such is the effect of the acts charged, even though not done in a public place, or in view of the public. * * *"

There is a further reason why this proposition merits very little attention. There are three acts stated disjunctively which come within the purview of the Nuisance Act. In this case the indictment charges that the act not only openly outraged public decency, etc., but it also

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grossly disturbed the public peace and health. It is a well-recognized rule that if such acts are stated conjunctively in the indictment it will suffice if one is proven. State v. Laundy, 103 Or. 443, 204 P. 958, 206 P. 290; State v. Gerritson, 124 Or. 525, 265 P. 422.

Counsel earnestly and ingeniously argues in his reply brief that State v. Buck, 200 Or. 87, 262 P. 2d 495, is authority for holding the indictment fundamentally deficient. There are several reasons why his position is untenable. In the first place, the indictment charged Dr. Buck with a violation of the manslaughter statute and not the nuisance statute. Furthermore, Dr. Buck was a medical doctor while here it is conceded that defendant is a chiropractor. Under the Oregon Medical Code there are certain abortions which duly licensed physicians and surgeons may lawfully perform. These provisions, however, do not apply to chiropractors. It is claimed that the indictment in the present case must fail because there are exceptions which make some abortions legal and that such exceptions must be negatived in the indictment. Counsel picks from the context of the Atwood case, *supra,* certain passages which tend to give credence to his position. However, the rule on negation is succinctly laid down in that case in the following language:

"* * * If this were a prosecution under a criminal statute and in the description of the offense certain exceptions are made, then such exceptions must be negatived in the indictment. * * * But the business of wrongfully and unlawfully committing and producing abortions can have no reference to, nor include instances in, the legitimate practice of medicine, in which an abortion may be necessary and lawful, and the charge of this offense need not negative such cases."

Illegal abortions are *mala in se,* denounced by the law, and where one conducts an abortion mill he brings himself within the class clearly condemned by the Nuisance Act. It is said in 1 Wood on Nuisances, 3d ed., §24, p. 46:

"This class of nuisances are of that aggravated class of wrongs that, being *malum in se,* the courts need no proof of their bad results and require none. The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness and the promotion of evil manners, and anything that produces that result finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance. In the following pages I shall enumerate a large number of occupations and practices that have been declared nuisances, together with the penalties that have been applied to them by the common law. It cannot be expected that I can give a list of every possible public nuisance, for it must be understood that whether a particular occupation, act or thing has been declared a nuisance or not, is a matter of small importance. If it comes within the rules that have been established by the courts, and such as have been dictated by the highest wisdom and soundest public policy, and is productive of the ill results that characterize these wrongs, it is a public nuisance, and will be punished as such, although the offense is new and has never before been specifically classified as such."

See State *ex rel.* Peterson v. Martin, 180 Or. 459, 176 P. 2d 636; People v. Hoffman, 103 N. Y. S. 1000, aff. 82 N. E. 1130; People v. Curtis, 136 N. Y. S. 582, aff. 100 N. E. 1131; 39 Am. Jur., Nuisances, §21.

Affirmed.

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APPENDIX "B".

Copy of Judgment in Question [R. 19].

Be It Remembered, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the city of Salem, on the first Monday, the 4th day of October, 1954, Whereupon on this Wednesday the 8th day of December, 1954, the same being the 14th judicial day of said term, there were present:

Earl C. Latourette, Chief Justice,
Harold J. Warner, Acting Chief Justice,
George Rossman, Associate Justice,
Hall S. Lusk, Associate Justice,
James T. Brand, Associate Justice,
Walter L. Tooze, Associate Justice,
William C. Perry, Associate Justice,
F. M. Sercombe, Clerk.

when the following proceedings were had:

The State of Oregon, Respondent, v. Dr. Ross H. Elliott, Appellant. Appeal from Multnomah County.

This cause on November 17, 1954, having been duly argued and submitted upon and concerning all questions arising upon the transcript and record and then reserved for further consideration; and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

It Is Therefore Considered, Ordered and Adjudged that the judgment of the court below in this cause rendered and entered be and the same is in all things affirmed.

It Is Further Ordered that respondent have and recover of and from appellant its costs and disbursements in this court taxed at $.

It Is Further Ordered that this cause be remanded to the court below from which the appeal was taken with directions to enter a judgment in accordance herewith.

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